IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 16, 2006 Session

STATE OF TENNESSEE v. DELINQUENT TAXPAYERS (PROVIDENT PROPERTIES)

Appeal from the Chancery Court for Davidson County
No. 02-814-III Ellen Hobbs Lyle, Chancellor

No. M2004-00951-COA-R3-CV - Filed: November 2, 2006

This appeal involves the efforts of the purchaser of real property at a tax sale to recover the expenses she incurred to repair the property during the redemption period. After receiving notice of the redemption, the purchaser filed a claim in the Chancery Court for Davidson County seeking, among other relief, reimbursement from the redemptioner for the repairs she had made to the redeemed property. The trial court, believing that the tax sale was void, declined to apply the measure of damages in Tenn. Code Ann. § 67-5-2704(a) (2003) and, following a bench trial, awarded the purchaser $21,764.36 based on the doctrine of mistake. The redemptioner takes issue on this appeal with the trial court's reliance on the doctrine of mistake. We have determined that the trial court erred by concluding that the tax sale was void and by failing to calculate the purchaser's recovery using Tenn. Code Ann. § 67-5-2704(a). We have also concluded that the evidence is not sufficient to assess damages under Tenn. Code Ann. § 67-5-2704(a) and, therefore, that the case must be remanded for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Austin L. McMullen, Nashville, Tennessee, for the appellant, LERETA Corporation.

Cristy Coors Beasley and Stephen J. Zralek, Nashville, Tennessee, for the appellee, Cristy Coors Beasley.

OPINION

I.

In October 1999, Provident Properties LLC (Provident Properties) acquired a .28-acre tract of improved real property at 111 Mayfair Road in the Cherokee Park area of Nashville. The property contained an uninhabited house that had fallen into disrepair. One year later, in October 2000, Provident Properties filed for bankruptcy protection under Chapter 11.[1] The bankruptcy proceeding was converted to a Chapter 7 proceeding in March 2001, and in May 2001, the Provident Properties' trustee abandoned the Mayfair Road property "because there . . . [was] no equity in the property." Associates Financial Services (Associates Financial) held a deed of trust on the Mayfair Road property. In June 2001, Associates Financial, with Provident Properties' consent, obtained relief from the automatic stay in bankruptcy "to permit . . . [it] to proceed with enforcement of its [d]eed of [t]rust." However, Associates Financial did not immediately foreclose on the Mayfair Road property.

On March 15, 2002, the Metropolitan Government of Nashville and Davidson County filed suit in the Chancery Court for Davidson County against Provident Properties to collect $2,465.57 in delinquent 2000 property taxes for the Mayfair Road property.[2] On April 22, 2002, the Metropolitan Government sought a default judgment having received no response from Provident Properties. The trial court entered a decree on May 16, 2002 ordering the property to be sold to collect the delinquent property taxes.[3]

In late May or early June, Cristy Coors Beasley, a Nashville lawyer, discovered that the Mayfair Road property was going to be sold for delinquent taxes. Ms. Beasley searched the title to the Mayfair Road property and was aware of the incumbrances on the property. However, she did not consult the bankruptcy court's records and, therefore, was unaware that the owner of the property was involved in a pending bankruptcy proceeding.

Ms. Beasley and her father, who is a licensed contractor and realtor, inspected the Mayfair Road property several times. She also performed "a very cursory amount of research in the law library" and was keenly aware that the property would be subject to the statutory one-year right of redemption by any person owning a legal or equitable interest in the property.[4] Notwithstanding her knowledge of the risks attendant to purchasing property at tax sales,[5] Ms. Beasley decided to

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[1]This record contains no evidence that Provident Properties listed the Metropolitan Government as a debtor in its bankruptcy petition or that the Metropolitan Government received notice from any source that Provident Properties had filed for bankruptcy.

[2]As far as we can determine from the record, the Metropolitan Government was unaware that Provident Properties had filed for bankruptcy when it filed suit against Provident Properties to collect the delinquent property taxes.

[3]The record contains no evidence that the Metropolitan Government informed any of the lienholders of record that it had filed suit to have the Mayfair Road property sold for the payment of delinquent taxes. The record contains no evidence that would support concluding that Associates Financial or any other lienholder was aware that the suit had been filed or that an order had been entered directing that the property be sold.

[4]*See* Tenn. Code Ann. §§ 67-5-2501(a)(1), (b)(1), 67-5-2701(a), 67-5-2702(a) (2003).

[5]Ms. Beasley testified that prior to the sale, she determined that "it was risky to buy a home at a tax sale, but that, you know, any money you spend on it would pretty much be reimbursable and that it might kind of be a fun project."

purchase the property because she believed that the lienholders would not attempt to redeem the property.[6]

On June 19, 2002, Ms. Beasley attended the tax sale on the second floor mezzanine at the Metropolitan Courthouse and purchased the property for $100,000. The trial court entered an order on August 9, 2002 confirming the sale and directing that the proceeds be used to pay the delinquent taxes for 2000 and 2001, as well as the penalties, interest, statutory attorney's fees, and costs.

Less than one month after purchasing the property, Ms. Beasley began making extensive repairs and improvements to the house and property. She moved into the Mayfair Road house between six and eight weeks after purchasing the property.

In September 2002, Associates Financial foreclosed on the Mayfair Road property[7] and sold it to Truman Capital Investment Fund, LP (TCIF) for $171,785.92. The trustee's deed conveying the property to TCIF is dated September 25, 2002.[8] TCIF turned over the property to Fairbanks Capital Corporation (Fairbanks Capital) for servicing. Fairbanks Capital, in turn, engaged LERETA Corporation (LERETA) to act as its agent for the management of the Mayfair Road property.

Between June 2002 and December 2002, Ms. Beasley spent approximately $25,737.46 and many hours of labor securing, cleaning up, and improving the property.[9] She changed the locks and repaired the windows. She removed debris from the property, mowed the yard, and obtained other landscaping services. Among the many repairs to the house, Ms. Beasley (1) repaired wiring and other electrical problems; (2) repaired the plumbing; (3) replaced the furnace and installed a central air conditioning system; (4) repaired the roof; (5) moved the utility service underground; (6) eliminated severe rodent and insect infestations; (7) patched and painted the interior walls; and (8) installed crown molding throughout the house.

On February 26, 2003, Ms. Beasley received a notice from the clerk and master that LERETA had redeemed the Mayfair Road property by paying $16,375.48 into court for the delinquent taxes, penalties, and interest. Ms. Beasley objected to LERETA's exercise of the right to redemption by questioning LERETA's interest in the property and by asserting defenses based on laches and waiver of the statutory and equitable right of redemption. In April 2003, Ms. Beasley filed two claims in

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[6]Ms. Beasley apparently did not talk with any of the lienholders. She testified at trial that she "didn't think anybody, any one of those lienholders that I knew about would come back because it wouldn't make any financial sense for them to do so. They had already lost so much money in making those loans to Provident Properties and John Wheatley that it wouldn't make sense for them to come in and – they couldn't sell the house for the value that they'd already spent."

[7]The record contains no evidence that Associates Financial was aware of the June 2002 tax sale when it foreclosed on the property.

[8]TCIF is referred to in the deed as "T C I F RE01, LLC."

[9]The record contains no evidence that TCIF, Associates Financial, or LERETA were aware that Ms. Beasley was living in the Mayfair Road house or of the repairs or improvements she was making.

the trial court seeking to recover $25,737.46 for the improvements she had made to the property and approximately $4,500.00 for the 2002 property taxes.

Thereafter, in an order filed on December 8, 2003, the trial court concluded that the June 2002 tax sale was void because it had been "held in derogation of the automatic bankruptcy stay." The court also determined that LERETA had complied with all the legal requirements to redeem the Mayfair Road property and that neither LERETA nor its principal had waived the right of redemption. Accordingly, the trial court instructed the parties to address the remaining issues, including Ms. Beasley's claim for "reimbursement . . . for maintenance and improvements."

Apparently Fairbanks Capital acquired TCIF's interest in the Mayfair Road property while this dispute was pending. In January 2004, Fairbanks Capital moved to intervene in the proceeding. The trial court granted the motion without objection several weeks later.

The trial court heard the evidence without a jury on February 26, 2004. Ms. Beasley presented unrebutted evidence that she had spent $29,198.46 to refurbish the Mayfair Road property and that these expenditures had increased the value of the property by approximately $75,000.00. Neither LERETA nor TCIF presented evidence. On March 8, 2004, the court entered an order permitting Ms. Beasley to recover from the clerk and master the $100,000.00 she had paid to purchase the property, together with $6,740.04 in accrued interest.

On March 9, 2004, the trial court filed a memorandum and order addressing Ms. Beasley's claim to recover the funds she had spend to refurbish the Mayfair Road property. Based on its earlier conclusion that the June 2002 tax sale was void, the court determined Tenn. Code Ann. § 67-5-2704(a) (2003) – the measure of recovery in redemption cases – did not apply. However, relying on the equitable doctrine of mistake,[10] the court determined that Ms. Beasley was entitled to recover $21,764.36 from Fairbanks Capital and LERETA. In an order entered on April 13, 2004, the trial court directed Ms. Beasley to "remove herself and her personal belongings" from the house and to turn over possession of the property to LERETA or its principal by April 23, 2004. LERETA perfected this appeal.

II.

The standards this court uses to review the results of bench trials are well-settled. With regard to a trial court's findings of fact, we will review the record de novo and will presume that the findings of fact are correct "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). If, however, the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the

[10] The trial court observed that Ms. Beasley had acted "diligently" with regard to searching the title to the Mayfair Road property before she purchased it but that she "was under the mistaken impression that there was no bankruptcy."

preponderance of the evidence lies without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Reviewing findings of fact under Tenn. R. App. P. 13(d) requires an appellate court to weigh the evidence to determine in which party's favor the weight of the aggregated evidence falls. There is a "reasonable probability" that a proposition is true when there is more evidence in its favor than there is against it. *Chapman v. McAdams*, 69 Tenn. (1 Lea) 500, 506 (1878); *see also* 2 MCCORMICK ON EVIDENCE § 339, at 484 (Kenneth S. Broun ed., 6th ed. 2006) (defining "proof by a preponderance " as "proof which leads the [finder of fact] to find that the existence of the contested fact is more probable than its nonexistence"). Thus, the prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. *Parks Props. v. Maury County*, 70 S.W.3d 735, 741 (Tenn. Ct. App. 2001); *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999).

Tenn. R. App. P. 13(d)'s presumption of correctness requires appellate courts to defer to a trial court's findings of fact. *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). Because of the presumption, an appellate court is bound to leave a trial court's finding of fact undisturbed unless it determines that the aggregate weight of the evidence demonstrates that a finding of fact other than the one found by the trial court is more probably true. *Parks Props. v. Maury County*, 70 S.W.3d at 742. Thus, for the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000).

The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not conclusions of law. Accordingly, appellate courts review a trial court's resolution of legal issues without a presumption of correctness and reach their own independent conclusions regarding these issues. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 48 S.W.3d 732, 734 (Tenn. Ct. App. 2000).

III.

The trial court's decision in this case rests on its conclusion that the sale of the Mayfair Road property for delinquent taxes was void because it violated the automatic stay stemming from Provident Properties' bankruptcy proceeding. Both Ms. Beasley and LERETA appear to have acquiesced in this conclusion because neither of them have taken issue with it on appeal. We have determined, however, that we must address this question in accordance with Tenn. R. App. P. 13(b) because it is outcome determinative. We have also determined that the trial court erred as a matter of law when it determined that the tax sale violated the automatic stay in bankruptcy.

The automatic stay triggered by commencing a bankruptcy proceeding is an essential feature of bankruptcy law and practice. It serves a two-fold purpose. First, it protects the debtor by stopping all collection efforts and harassment and by giving the debtor an opportunity to attempt to reorganize or, more simply, to be relieved of the financial pressures that precipitated filing for bankruptcy in the first place. Second, the automatic stay protects creditors by preventing other creditors from taking unilateral action against the debtor to the detriment of the other creditors. *Maritime Elec. Co. v. United Jersey Bank*, 959 F. 2d 1194, 1204 (3d Cir. 1991).

The automatic stay is self-executing. The debtor is not required to request that it be issued or applied to a specific proceeding. *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 259 (3d Cir. 2006). It also applies without regard to whether other parties to a proceeding against a debtor in bankruptcy are aware that the debtor has filed a bankruptcy petition. *Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995).

Unless one of the exceptions to the automatic stay applies, actions taken in violation of an automatic stay are void ab initio and are without effect regardless of notice. *40235 Washington St. Crop. v. Lusardi*, 329 F.3d 1076, 1080 (9th Cir. 2003); *Middle Tenn. News Co. v. Charne of Cincinnati, Inc.*, 250 F.3d 1077, 1082 (7th Cir. 2001); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982); 3 COLLIER ON BANKRUPTCY ¶ 362.11[1] (Alan N. Resnick et al. eds., 15th ed rev. 2006). This rule applies to tax sales conducted by state and local governments. *In re Pierce*, 91 F. App'x 927, 929, 2004 WL 180408, at *2 (5th Cir. 2004); *In re Burg*, 295 B.R. 698, 705 (Bankr. W.D.N.Y. 2003); *In re Key*, 276 B.R. 452, 455 (Bankr. N.D. Miss. 2000); *McKeen v. FDIC*, 549 S.E.2d 104, 106 (Ga. 2001); *Oles v. Curl*, 65 S.W.3d 129, 131 (Tex. App. 2001).

However, the application of the automatic stay may be affected by the actions of the debtor's trustee in bankruptcy. When a trustee abandons property under 11 U.S.C.A. § 554(a), (b), or (c) (West 2004), the property ceases to be part of the debtor's bankruptcy estate and reverts to the debtor. *Catalano v. Commissioner*, 279 F.3d 682, 685 (9th Cir. 2002); *Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339, 1346 n.9 (7th Cir. 1987); *In re Hopkins*, 346 B.R. 294, 306-07 (Bankr. E.D.N.Y. 2006). Thus, once a trustee abandons property, it stands as if no bankruptcy petition had been filed, *In re Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990), and the jurisdiction of the bankruptcy court ceases over all matters pertaining to the abandoned property. *In re Keller*, 229 B.R. 900, 902 (Bankr. S.D. Ohio 1998). Thus, proceedings involving property that has been abandoned by a trustee in bankruptcy is no longer subject to the automatic stay.

Provident Properties' trustee in bankruptcy abandoned the Mayfair Road property in May 2001 after determining that there was no equity in it. One month later, Associates Financial obtained relief from the automatic stay as a precursor to foreclosing on the property. Thus, by the time the Metropolitan Government filed suit in March 2002 to sell the property for delinquent taxes, the property was no longer part of Provident Properties' estate in bankruptcy and, therefore, was no longer subject to the automatic stay in bankruptcy. It necessarily follows that the delinquent tax proceedings in state court that culminated in the sale of the Mayfair Road property to Ms. Beasley in June 2002 did not violate the automatic stay arising from Provident Properties' bankruptcy proceeding.

IV.

Because the tax sale did not violate the automatic stay in bankruptcy, this proceeding is nothing more than a redemption of the Mayfair Road property by LERETA. Accordingly, Tenn. Code Ann. § 67-5-2704(a) governs the amount that Ms. Beasley may recover for the work she performed on the property between June 2002 and December 2002. By statute, she is entitled to recover from LERETA only the "moneys expended to preserve the value of the property."

A.

The government's power to tax real property includes the power to sell the property when the owner fails to pay the required tax. This power did not exist at common law, 1 ROBERT S. BLACKWELL, A PRACTICAL TREATISE ON THE POWER TO SELL LAND FOR THE NON-PAYMENT OF TAXES § 121, at 117 (rev. 5th ed. 1889), and the courts have characterized the statutes authorizing the sale of real property to collect delinquent taxes as particularly harsh measures. *Albertson v. Leca*, 447 A.2d 383, 388 (R.I. 1982); *Topps v. County of Walworth*, 659 N.W.2d 177, 182 (Wis. Ct. App. 2003). Many state legislatures, including Tennessee's, have mitigated the harshness of the remedy by giving property owners a statutory right to redeem their real property after it has been sold for delinquent taxes by paying a compensatory sum to the tax sale purchaser within a prescribed period.

The statutory right of redemption is a valuable right. *Plemons v. Gale*, 396 F.3d 569, 575 (4th Cir. 2005); *VOSR Indus., Inc. v. Martin Props., Inc.*, 919 So.2d 554, 556 (Fla. Dist. Ct. App. 2005); *Miles Homes Div. of Insilco Corp. v. City of Westhope*, 458 N.W.2d 321, 326 (N.D. 1990). Thus, the courts, as a matter of general policy, construe the statutes governing the sale of property for delinquent taxes, and specifically the statutes providing the right of redemption, liberally in favor of the redeeming party. *Blizzard v. Moniz*, 518 S.E.2d 407, 410 (Ga. 1999); *Serion v. Thornton*, 85 P.3d 186, 193 (Haw. 2004); *In re County Treasurer of Cook County*, 753 N.E.2d 363, 367 (Ill. App. Ct. 2001); *Norwood v. Moore*, 932 So. 2d 63, 66 (Miss. Ct. App. 2006); *Carney v. Philippone*, 806 N.E.2d 131, 134 (N.Y. 2004).

In Tennessee, the amount that a property owner must pay to redeem real property that has been sold for delinquent taxes is governed entirely by statute. Tenn. Code Ann. § 67-5-2703 (2003) requires the redemptioner to pay the tax sale purchaser "the amount paid for delinquent taxes, interest and penalties, court costs and any court ordered charges, and interest at the rate of ten percent (10%) per annum computed from the date of the sale on the entire purchase price at the tax sale." The "court ordered charges" referred to in Tenn. Code Ann. § 67-5-2703 are further defined in Tenn. Code Ann. § 67-5-2704(a) to include "any other lawful charges or moneys expended to preserve the value of the property." Persons seeking to redeem property in Tennessee cannot be required to pay any charges other than those specified in Tenn. Code Ann. §§ 67-5-2703 and 67-5-2704(a).

B.

This appeal focuses on the portion of Tenn. Code Ann. § 67-5-2704(a) that requires redemptioners to reimburse tax sale purchasers for the "moneys expended to preserve the value of the property." This phrase is unique to Tennessee, and it has received scant judicial attention by Tennessee's courts over the years. Accordingly, our current task is to ascertain and give full effect to the Tennessee General Assembly's purpose without unduly restricting or expanding the scope of Tenn. Code Ann. § 67-5-2704(a) beyond its intended application. *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 522 (Tenn. 2005); *Sallee v. Barrett*, 171 S.W.3d 822, 828 (Tenn. 2005).

The phrase "preserving the value of the property" provides little objective guidance for determining whether a particular repair or alteration to a structure during the redemption period is reimbursable under Tenn. Code Ann. § 67-5-2704(a). However, its meaning becomes clearer when it is considered in light of Tenn. Code Ann. § 67-5-2705 (2003) which obligates tax sale purchasers to "take reasonable steps to prevent waste" during the redemption period. When read together, Tenn. Code Ann. §§ 67-5-2704(a) and 67-5-2705 codify a tax sale purchaser's common-law obligation to refrain from committing "permissive waste." They do not give a tax sale purchaser free rein to improve the property during the redemption period.

In the context of Tenn. Code Ann. § 67-5-2705, "waste" connotes unreasonable conduct by a person in rightful possession of real property that results in the destruction or permanent physical damage of the property and in substantial diminution in the value of other persons' interests in the property. *Chapman Drug Co. v. Chapman*, 207 Tenn. 502, 510, 341 S.W.2d 392, 396 (1960); *Thompson v. Thompson*, 206 Tenn. 202, 214, 332 S.W.2d 221, 227 (1960).[11] Waste can be caused either by acts of commission or acts of omission. Thus, "voluntary waste" results from deliberate, affirmative acts by the possessor of property.[12] On the other hand, "permissive waste" results from the failure of the possessor of property to exercise the reasonable care to preserve and protect the future estate or interest of another.[13]

Whether particular conduct amounts to permissive waste depends on the facts and circumstances of the case. *Wingard v. Lee*, 336 S.E.2d 498, 500 (S.C. Ct. App. 1985); *Three and One Co. v. Geilfuss*, 504 N.W.2d 393, 397 (Wis. Ct. App. 1993); THOMPSON ON REAL PROPERTY §§ 70.04(c), at 298, 70.08(a), at 335-36. The question of what constitutes permissive waste is a question of law; while the question of whether permissive waste has been committed is a question of fact. *Judkins v. Charette*, 151 N.E. 81, 83 (Mass. 1926); *Van Syckel v. Emery*, 18 N.J. Eq. 387, 389-90, 1867 WL 4131, at *3 (N.J. Ch. 1867); TIFFANY ON REAL PROPERTY § 630, at 631.

Normal wear and tear is not considered to be permissive waste. *See Forsey v. Luton*, 39 Tenn. (2 Head) 183, 186 (1858); POWELL ON REAL PROPERTY § 56.05[2]; THOMPSON ON REAL PROPERTY § 70.08(b)(3)(ii), at 345; TIFFANY ON REAL PROPERTY § 630, at 630-31. However, barring a statute or contractual obligation to the contrary, the possessor of property must keep the property in the same general condition that it was at the time of possession. *White Mountain Apache*

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[11] *See also* WYNDHAM ANSTIS BEWES, THE LAW OF WASTE 9 (London, Sweet & Maxwell, Ltd. 1894) (THE LAW OF WASTE); 8 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 636, at 56-3 (Michael Allan Wolf ed., 2000) (POWELL ON REAL PROPERTY).

[12] *333 West Thomas Med. Bldg. Enters. v. Soetantyo*, 976 F. Supp. 1298, 1300 (D. Ariz. 1995); 8 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 70.06(a), at 300-01 (2d ed. 2005) (THOMPSON ON REAL PROPERTY); 2 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 56.03 (3d ed. 1939) (TIFFANY ON REAL PROPERTY).

[13] *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1379 (Fed. Cir. 2001); *Curtis v. Tromble*, 747 P.2d 590, 591 (Ariz. Ct. App. 1987); *Cowart v. White*, 711 N.E.2d 523, 532 (Ind. 1999); *Boucher Inv. L.P. v. Anapolis-West Ltd. P'ship*, 784 A.2d 39, 49 (Md. Ct. Spec. App. 2001); *Keesecker v. Bird*, 490 S.E.2d 754, 769 (W. Va. 1997); *see also* POWELL ON REAL PROPERTY § 56.05[2]; THOMPSON ON REAL PROPERTY § 70.06(b), at 301; TIFFANY ON REAL PROPERTY § 640, at 649.

Tribe v. United States, 249 F.3d at 1382; THOMPSON ON REAL PROPERTY § 70.08(a), at 334. Thus, persons in possession of real property commit permissive waste if they allow a structure to deteriorate for lack of repair. *Southern Real Estate & Fin. Co. v. City of St. Louis*, 758 S.W.2d 75, 92 (Mo. Ct. App. 1988); *Stovall v. Edwards*, 151 P.2d 385, 386 (Okla. 1944); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 726 P.2d 8, 23-24 (Wash. 1986).

Historically, the possessors of property have been required to keep the premises wind tight and air tight. THOMPSON ON REAL PROPERTY § 70.08(b)(3), at 344; TIFFANY ON REAL PROPERTY § 642, at 652. While they are required to stabilize a dilapidated structure to prevent further deterioration, they are not required to renovate it. THE LAW OF WASTE 212; THOMPSON ON REAL PROPERTY § 70.08(b)(3)(ii), at 345. Accordingly, the courts have concluded that the failure to make roof repairs,[14] the failure to replace a furnace to prevent damage from freezing,[15] the failure to paint the exterior of a structure,[16] and the failure to replace or maintain gutters[17] amounts to permissive waste.

C.

Work performed on a structure that prevents waste certainly improves property and preserves its value. However, not all work performed on a structure is compensable under Tenn. Code Ann. § 67-5-2704(a). Work that goes beyond maintenance and preservation and that enhances or upgrades an existing structure is not compensable. This sort of work, commonly referred to as improvements, is not compensable for two reasons. First, neither Tenn. Code Ann. § 67-5-2703 nor Tenn. Code Ann. § 67-5-2704(a) require redemptioners to pay for "improvements." Second, requiring redemptioners to pay for all improvements made during the redemption period would, as a practical matter, impair or defeat the right of redemption.

Under early English and American common law, persons who made improvements on real property belonging to another could not recover either the cost or the value of the improvements from the property owner, even if they were acting with a good faith belief that they owned the property. *Townsend v. Shipp's Heirs*, 3 Tenn. (1 Cooke) 293, 298 (1813); RESTATEMENT OF RESTITUTION § 42(1) (1937); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *334-35 (13th ed. 1884). While the Tennessee General Assembly, like its counterparts in other states, eventually decided to relax the common-law rule with regard to properties sold for delinquent taxes, it struck a balance between the interests of the tax sale purchasers and the redemptioners that was intended to favor the redemptioners and to preserve the right of redemption.

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[14] *See, e.g., Smith v. Smith*, 241 S.W.2d 113, 114 (Ark. 1951); *Stouter v. Bailey*, 545 A.2d 98, 102 (Md. Ct. Spec. App. 1988); THE LAW OF WASTE 212; TIFFANY ON REAL PROPERTY § 642, at 653.

[15] *See, e.g., Stouter v. Bailey*, 545 A.2d at 102.

[16] *See, e.g., In re Steele*, 19 N.J. Eq. 120, 120, 1868 WL 4173, at *1 (N.J. Ch. 1868).

[17] *See, e.g., Wade v. Pittsburg Mach. & Tool Co.*, 40 Pa. Super. 365, 369, 1909 WL 4017, at *3 (Pa. Super. Ct. 1909).

The practice by "designing and unscrupulous" persons of inveigling real property from its owner by placing improvements on the property that the owner could not afford has been known since our earliest days. *See Fisher v. Edington*, 80 Tenn. (12 Lea) 189, 198-99 (1883); *McKinly v. Holliday*, 18 Tenn. (10 Yer.) 477, 478 (1837); *Townsend v. Shipp's Heirs*, 3 Tenn. (1 Cook) at 298. Accordingly, when the Tennessee General Assembly enacted the statutes authorizing the sale of real property for delinquent taxes, it understood that tax sales could provide "designing and unscrupulous" persons with another opportunity to acquire property at far less than its actual value. The General Assembly decided to deter this practice by limiting the amount that tax sale purchasers could recover from redemptioners for improvements to the property undertaken during the redemption period. Thus, rather than permitting tax sale purchasers to recover the cost or value of improvements made during the redemption period, the General Assembly limited the right of recovery to the costs incurred to "preserve the value of the property."

Other state legislatures have also recognized that requiring redemptioners to pay for all the improvements to their property during the redemption period could impair or even defeat their ability to exercise their statutory redemption rights. *See Associated Estates, LLC v. Caldwell*, 779 A.2d 939, 946 (D.C. 2001); *Chase Manhattan Bank v. Candelaria*, 90 P.3d 985, 987 (N.M. 2004). Accordingly, they enacted statutes similar to Tenn. Code Ann. § 67-5-2704(a) limiting the amount a redemptioner must pay to redeem its property from the tax sale purchaser. While the particulars of these statutes may differ from Tenn. Code Ann. § 67-5-2704(a), they have been construed consistently to prevent a purchaser of real property at a judicial sale from requiring the redemptioner to pay for improvements made during the redemption period, if (1) the purchaser was aware of the right of redemption and (2) the redemptioner has done nothing to mislead the purchaser about its willingness to pay for the improvements. *McCloud v. AmSouth Bank*, 540 So.2d 75, 77 (Ala. Ct. App. 1989); *Chase Manhattan Bank v. Candelaria*, 90 P.3d at 987-88; *W.T. Watts, Inc. v. Sherrer*, 571 P.2d 203, 209 (Wash. 1977).[18]

Whether particular work is compensable under Tenn. Code Ann. § 67-5-2704(a) depends on the condition and use of the property at the time of the tax sale. Replacing a leaking roof clearly prevents waste and preserves the value of the property; however, the installation of a more expensive, aesthetically pleasing roof when the existing roof could be repaired would not be compensable even though it would prevent further deterioration. By the same token, installing a new central heat and air conditioning system to make an uninhabitable house livable would not be compensable in the absence of evidence that the new system was required to prevent further deterioration of the house.

[18] These courts have likewise held that purchasers of real property at a judicial sale cannot use "betterment statutes" such as Tenn. Code Ann. § 29-15-123 (2000) to recover the cost or value of improvements made during the redemption period. They note that betterment statutes, by their own terms, apply to ejectment proceedings, not redemption proceedings, and that purchasers at judicial sales who have knowledge of the right of redemption are not holding in good faith under color of title. *M & P Enters., Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 164 (Mo. 1997); *Chase Manhattan Bank v. Candelaria*, 90 P.3d at 988.

D.

The trial court found that Ms. Beasley was entitled to recover $21,764.36 of the $29,198.46 she spent on the Mayfair Road property. The court, however, did not explain the basis for its conclusions, and it did not have the benefit of the guidelines we have established in this opinion. We have carefully reviewed the evidence in this record, such as it is, to determine whether it enables us, on a de novo review in accordance with Tenn. R. App. P. 13(d), to make findings of fact regarding each of Ms. Beasley's expenditures. We have concluded that the evidence does not permit us to decide which of Ms. Beasley's expenditures, if any, are compensable under Tenn. Code Ann. § 67-5-2704(a).[19]

Accordingly, we are left with no alternative other than to vacate the judgment and remand the case to the trial court for a new trial regarding the compensability of Ms. Beasley's expenditures during the redemption period. Because Ms. Beasley is the party seeking to recover, she has the burden of proof. Ms. Beasley may recover all or part of her expenditures only if she proves (1) that LERETA agreed to pay for the work, (2) that LERETA was aware of the work but did nothing to stop it,[20] or (3) that her various expenditures are compensable under Tenn. Code Ann. § 67-5-2704(a).

V.

The judgment is vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal in equal proportions to LERETA Corporation and its surety and to Cristy Coors Beasley for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

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[19] For example, the record contains evidence regarding the mold found in the house. While the mold presented serious concerns regarding the habitability of the house, no evidence was presented regarding the effect that the mold had on the structural integrity of the house during the redemption period or even that it would have cost more to deal with the mold at the end of the redemption period than it would have at the beginning. Without evidence of this sort, no conclusions can be drawn with regard to the compensability of Ms. Beasley's expenditures of a new central heat and air conditioning system.

[20] *See City of Philadelphia v. Watkins*, 494 A.2d 1135, 1139 (Pa. Super. Ct. 1985) (allowing tax sale purchasers to recover the cost of repairs to an uninhabitable house based on proof that the redemptioner was aware that the repairs were being made and decided to redeem the property only because the repairs had substantially increased its value).